
UTAH LABOR COMMISSION

DENISE SPEAR,

Petitioner,

vs.

**WENCOR WEST INC. and LIBERTY
MUTUAL INSURANCE COMPANY,**

Respondents

**ORDER AFFIRMING
ALJ'S DECISION**

Case No. 02-0935

Wencor West Inc. and its insurance carrier, Liberty Mutual Insurance Company (referred to jointly as “Wencor” hereafter), ask the Utah Labor Commission to review Administrative Law Judge Lima's award of benefits to Denise Spear under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 3, Utah Code Annotated).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated §63-46b-12, §34A-2-801(3) and §34A-3-102.

BACKGROUND AND ISSUE PRESENTED

On August 22, 2002, Ms. Spear filed an application for occupational disease benefits against Wencor for “allergic conjunctivitis bacterial + numbness and redness caused by machine ventilation.” Judge Hann held an evidentiary hearing on Ms. Spear’s claim and then appointed a medical panel to evaluate the medical aspects of the claim. Before the panel issued its decision, Judge Hann resigned and Judge Lima assumed responsibility over Ms. Spear’s claim. Upon receipt of the medical panel’s report, Judge Lima concluded that Ms. Spear suffered from occupational asthma caused by her exposure to polyethylene fumes.¹ Judge Lima ordered Wencor to pay medical benefits and temporary disability compensation to Ms. Spear.

In requesting Commission review of Judge Lima’s decision, Wencor argues it was denied due process because Ms. Spear’s initial application did not list occupational asthma caused by polyethylene fumes as the basis for her occupational disease claim, and the medical panel did not identify the specific composition of the polyethylene fumes. Wencor also argues the medical panel’s report is contradicted by other, more persuasive medical evidence. Finally, Wencor challenges the duration of Ms. Spear’s temporary disability compensation.²

¹ The Commission substitutes “polyethylene fumes” for the lengthier “thermal degradation products of polyethylene plastic” used by the medical panel. Both terms refer to the chemical compounds released when heat is applied to polyethylene.

² The Commission has reordered Wencor’s 2nd and 3rd arguments to allow a more logical discussion

FINDINGS OF FACT

The Commission adopts Judge Lima's statement of the procedural and substantive facts of Ms. Spear's claim. The following facts are material to the issues raised in Wencor's motion for review.

Ms. Spear's application for occupational disease benefits alleged "allergic conjunctivitis bacterial + numbness and redness" as a result of exposure to "machine ventilation" while working at Wencor. The application included as an attachment Dr. Gasecki's opinion that Ms. Spear suffered from work-related "nasal rhinitis (allergy)."

Wencor denied Ms. Spear's claim as not "related to her work activities or environment" and asserted that Ms. Spear's "exposures at work were identical to those exposures to which the general public is routinely exposed" Thereafter, Wencor deposed Ms. Spear and Dr. Kenner, a physician specializing in occupational lung disease at the University of Utah. In both deposition, Wencor obtained information indicating that Ms. Spear suffered respiratory disease as a result of her work exposures to chemicals, including polyethylene. Wencor also obtained Ms. Spear's medical records, which included similar information.

During the evidentiary hearing in this matter, Ms. Spear testified and was cross-examined about her operation of a machine at Wencor that used heat to seal polyethylene bags, her exposure to fumes from that process, and her contemporaneous development of respiratory problems. Samples of the polyethylene bags were admitted into evidence.

After the hearing, Judge Hann appointed a medical panel to consider the medical aspects of Ms. Spear's claim. Judge Hann specifically asked the panel to determine whether Ms. Spear's pulmonary problems were caused by her work-related exposures at Wencor. Wencor did not object to the questions Judge Hann posed to the medical panel; to the contrary, Wencor specifically asked that Dr. Kenner's deposition be submitted to the medical panel. Wencor also provided the panel with information about the process used to seal polyethylene bags and samples of the bags.

The medical panel reviewed Ms. Spear's medical history, diagnostic testing, and the opinions of other physicians who had treated or examined Ms. Spear. The panel also personally examined Ms. Spear and reviewed the depositions and exhibits submitted by the parties. Based on this information, the panel concluded that Ms. Spear suffered from asthma which was entirely caused by her work-related exposure to polyethylene fumes. The panel also concluded that Ms. Spear required "aggressive inhaled medication and follow-up for asthma over an extended period of time," as well as other treatment. Because Ms. Spear had not yet received this required medical treatment, the panel concluded she had not achieved maximum medical improvement.

Over Wencor's objections, Judge Lima accepted the medical panel's report and awarded occupational disease benefits to Ms. Spear. Wencor then filed its request for Commission review.

DISCUSSION AND CONCLUSION OF LAW

As already noted, Wencor has raised three primary arguments in its motion for review: 1) due process; 2) weight to be given the medical panel's report; and 3) duration of Ms. Spear's temporary disability compensation. The Commission addresses each of these arguments below.

Due process. Wencor argues it did not have reasonable notice of the nature of Ms. Spear's occupational disease claim and, therefore, did not have a fair opportunity to defend against the claim. In support of this argument, Wencor points out that Ms. Spear's initial application described her occupational disease as "allergic conjunctivitis bacterial + numbness and redness caused by machine"—not "occupational asthma," as diagnosed by the medical panel.

Wencor is correct in arguing that it was entitled to sufficient notice of Ms. Spear's claim to allow it to investigate, prepare and then respond to the claim. However, the Commission concurs with Judge Lima's judgment that, under the circumstances of this case, Wencor received adequate notice. If Ms. Spear's initial description of her medical condition was somewhat vague, her physicians' diagnoses focused on pulmonary problems associated with exposure to chemicals at work. Wencor was aware of these diagnoses, as well as deposition testimony from Ms. Spear and Dr. Kenner. The Commission finds no support in the record for Wencor's argument that it lacked notice of Ms. Spear's claim and, therefore, was denied due process.

The Commission notes that Wencor cites Rule 15 of the Utah Rules of Civil Procedure for the proposition that "a party is bound by the allegation he or she alleges in his or her application for hearing." However, the Utah Rules of Civil Procedure are not generally applicable in administrative adjudicative proceedings such as these. (See *Clausing v. Frito-Lay, et al.*, Case No. 03-0892, issued by the Commission's Appeals Board on October 23, 2006.) Furthermore, even if Rule 15 were applicable, subsection (b) of the rule provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." In this case, Ms. Spear's claim for work-related asthma was actually tried by the consent of the parties. Thus, Rule 15(b) would not prevent adjudication of her claim.

Medical panel report. The fundamental issue before the Commission is whether a medical causal connection exists between Spear's work at Wencor and her pulmonary problems. The parties disagreed on this point. Wencor's medical consultant found no relationship between Ms. Spear's work and her health problems, but two of Ms. Spear's physicians attributed Ms. Spear's problems to chemical exposures at Wencor. In light of this disagreement among the medical experts, it was appropriate for Judge Hann to seek the impartial opinion of a medical panel. The medical panel concluded that Ms. Spear suffered from occupational asthma entirely caused by her work at Wencor.

The Commission finds the medical panel's opinion persuasive. The panel was impartial in this matter, with no ties to either party. The panel was able to review all Ms. Spear's medical

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records and had the benefit of opinions previously rendered by the parties' medical experts. The panel also had the opportunity to personally examine Ms. Spear. The panel's report is well-reasoned and clearly identifies the basis for its conclusions. For these reasons, the Commission accepts the medical panel's determination that Ms. Spear suffers from occupational asthma.

Duration of temporary total disability compensation. Subsection 410(1)(a), which governs entitlement to temporary total disability compensation, provides that "in case of temporary disability, so long as the disability is total, the employee shall receive (compensation)" This provision must be interpreted in light of two decisions by the Utah Supreme Court. In *Entwistle Co. v. Wilkins*, 626 P.2d 495, 498 (Utah 1981), the Court held that an injured worker's temporary disability "may be found to be total if he can no longer perform the duties of the character required in his occupation prior to his injury." In *Booms v. Rapp*, 720 P. 2d 1363, 1366 (Utah 1986), the Court ruled that "once a claimant reaches medical stabilization, the claimant is moved from temporary to permanent status and he is no longer eligible for temporary benefits."

Wencor argues that, despite Ms. Spear's asthma, she can still perform some types of work, such as answering telephones or serving as a receptionist. In light of Ms. Spear's limited English-language skills, the Commission does not believe she could actually perform such functions. Furthermore, the applicable test for temporary total disability is not whether Ms. Spear can do "any" work, but rather, whether she can do the type of work she performed before she developed her occupational asthma. See *Entwistle*, supra. And on that point, the medical evidence establishes that Ms. Spear cannot return to the manufacturing environment where she previously worked. Ms. Spear therefore qualifies for temporary total disability compensation.

As to the duration of Ms. Spear's temporary total disability compensation, such compensation continues until she reaches medical stability. Because Ms. Spear has not received the medical care she requires to treat her occupational disease, she has not achieved medical stability. She is therefore entitled to temporary total disability compensation until she reaches medical stability, as set forth in Judge Lima's order.

ORDER

The Commission affirms Judge Lima's decision. It is so ordered.

Dated this 1st day of March, 2007.

Sherrie Hayashi
Utah Labor Commissioner